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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES PETER O'BRIEN, Defendant and Appellant.	C080472 (Super. Ct. No. 14F01302)

A jury found defendant James Peter O'Brien guilty of possessing methamphetamine in Folsom State Prison (Pen. Code, § 4573.6 -- count one)[1] and possession of methamphetamine for the purpose of sale (Health & Safe. Code, § 11378 -- count four). Defendant also admitted he was previously convicted of first degree murder,

[1] Further undesignated statutory references are to the Penal Code.

a strike offense. The trial court sentenced defendant to prison for six years. Defendant timely appeals.

Defendant's sole contention on appeal is that he received ineffective assistance of counsel at trial because of a joke his attorney made immediately prior to giving his closing argument; a joke which defendant contends amounted to misconduct. We disagree and affirm the judgment as modified to correct a sentencing error.

BACKGROUND

Defendant was tried by jury. The People introduced evidence that defendant obtained the methamphetamine during a visit with his wife and attempted to bring the contraband into the prison in his rectum. We omit further details of the evidence and trial until closing argument, because only the happenings surrounding defense counsel's closing argument are relevant to defendant's single claim on appeal.

At the end of the prosecutor's (initial) closing argument, she told the jurors: "But I want to leave you with this before [defense counsel] Mr. Dorfman comes up because Mr. Dorfman, you know, he has a very likeable personality. And even [defendant] -- yes, and even [defendant] on the stand appears personable. And it could be really tough sometimes as a juror to sit in judgment. So there may be things that you really like about him and you don't like about me. That's fine. I don't need you to like me. But what I would hope is that you follow the law. [¶] This isn't a personality contest. It's not a beauty contest."

The trial court then called a recess for lunch. Following the lunch break, the trial court confirmed everyone was present and the following colloquy took place:

"THE COURT: Mr. Dorfman, would you like to give a closing argument?

"MR. DORFMAN: No, but I will.

"THE COURT: Go ahead, sir.

"(Laughter in the courtroom.)

"MR. DORFMAN: Good afternoon.

"THE JURY PANEL: Good afternoon.

"MR. DORFMAN: I hope you had a good lunch. Stay awake. I won't be long, okay."

Defense counsel then argued for the defense. He challenged the credibility of the prosecution witnesses, argued that the prison's search policies were "inhuman," and concluded that defendant was innocent.

The jury later found defendant guilty on both counts and the trial court sentenced defendant to the middle term of three years in state prison, doubled for the strike, on count one. The trial court did not impose sentence on count four.

DISCUSSION

Defendant claims trial counsel's response to the court's question "would you like to give a closing argument?" was deficient and prejudicial because by responding, "No, but I will," counsel telegraphed to the jury that he disbelieved defendant.

To establish ineffective assistance of trial counsel, defendant must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to the defendant. (*People v. Maury* (2003) 30 Cal.4th 342, 389; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 692-693].) If defendant makes an insufficient showing on either one of these components, his ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

"The decision of how to argue to the jury after the presentation of evidence is inherently tactical . . . ." (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) "Competent attorneys, including competent criminal defense attorneys, have varied styles in front of juries. Some are hard charging, others soft-spoken; some try to gain the jurors' confidence by humor or other means, others are always businesslike; some profess incredulity at all opposing evidence, others save their ammunition for specific targets. Competent attorneys might adopt different styles for different cases. No single right way exists to try a case." (*People v. Riel* (2000) 22 Cal.4th 1153, 1177.)

Here, defendant's trial counsel was clearly using humor to connect with the jurors after everyone involved in the trial had returned from lunch. The prosecutor had suggested earlier that counsel might employ this tactic, counsel did, and the tactic was successful in that it got the jurors' attention and made them laugh. It is apparent that counsel's style, at least for this case, was to "gain the jurors' confidence by humor . . . ." (*People v. Riel, supra,* 22 Cal.4th at p. 1177; see also *People v. Fairbank* (1997) 16 Cal.4th 1223, 1251 ["Closing argument is as much an art as a science . . . . Counsel must establish as much credibility with the jurors as possible if his effort to persuade them is to succeed"].) Apparently counsel's good humor had been evident throughout the trial, because before counsel could even begin his closing argument, the prosecutor had reminded the jury "this isn't a personality contest."

Defendant nevertheless argues that counsel's isolated remark signaled to the jury that he did not believe defendant was innocent, rather than that he was tired and unfocussed after lunch and knew the jurors would be as well, or that he was teasing the judge who had just asked him if he would "like to" give a closing argument (rather than simply telling counsel to do so), or some other similarly empathetic and humorous explanation. But counsel immediately launched into a lengthy argument for acquittal, challenging the credibility of the People's witnesses and repeatedly reminding the jury to hold the People to their burden of proof beyond a reasonable doubt. The solid argument,

about which defendant does not complain, consumes 11 pages of the reporter's transcript. Read in context, the isolated remark "no, but I will" is not misconduct and in no way constituted deficient representation.

Accordingly, we reject defendant's claim of ineffective assistance.

Although raised by neither party, in reviewing this case, we have observed that the trial court failed to impose any sentence on count four, misapplying section 654, which requires a court to impose a sentence and then stay it. Here, we assume the court intended with its silence to stay imposition of sentence on count four, because section 654 clearly applied in this case, as the same possession of the same methamphetamine resulted in the both counts of conviction. However, this omission resulted in an unauthorized *lack* of sentence. (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1467-1473.) Because the trial court imposed an unauthorized sentence, we could remand for a new sentencing hearing, but "[t]he futility and expense of such a course militates against it." (*Id.* at p. 1473.) Instead, we modify the judgment (§ 1260) to impose and stay (§ 654) a midterm sentence of two years on count four, possession of a controlled substance for sale. This is undoubtedly the sentence the trial court would have imposed given that the possession for sale involved the same drugs defendant possessed in prison (count one) and the trial court sentenced defendant to the midterm on that count. (*Ibid.*)

We also observe that the abstract of judgment incorrectly lists defendant's conviction on count two (rather than count four). We direct the abstract amended and corrected to reflect the modification we have detailed above and the correct charge and corresponding count of conviction.

DISPOSITION

The judgment is affirmed as modified. The trial court is directed to prepare an amended and corrected abstract of judgment consistent with this opinion and to supply a certified copy to the Department of Corrections and Rehabilitation.

/s/
Duarte, J.

We concur:

/s/
Nicholson, Acting P. J.

/s/
Murray, J.